OFFICE SUPREME COURT U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 176.

ROBERT MITCHELL, *Plaintiff in Error,*

vs.

A. M. OVERMAN, ADMINISTRATOR OF CONRAD STUTZMAN.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR DEFENDANT IN ERROR.

STANLEY MATTHEWS,
WM. M. RAMSEY,
Counsel for Defendant in Error.

Supreme Court of the United States.

ROBERT MITCHELL,
Plaintiff.
vs.
A. M. OVERMAN, Administrator
of CONRAD STUTZMAN, *Defendant.*
} *Petition in Error.*

BRIEF FOR DEFENDANT IN ERROR.

I.

STATEMENT.

This action is grounded upon a judgment rendered by the District Court of Webster County, Iowa. Conrad Stutzman was plaintiff and Robert Mitchell impleaded with others, was defendant.

The suit being at issue and ready for final decree, came on for hearing at the October Term, 1868, of said court, which was a court of general jurisdiction and had jurisdiction of the subject matter of said suit and the parties thereto, Mitchell among others was then tried, finally submitted and taken under advisement by the court. The decree found at page of the printed record was entered in October, 1872. Stutzman

having died since the final submission of the suit and his death having been suggested to the court, the decree was entered *nunc pro tunc* as of the first day of the October term, 1868, of said court, the term of the submission.

Upon the hearing below the Circuit Court rendered judgment against Mitchell for the sum of five thousand, three hundred and sixty, and sixteen-hundredths ($5,316.16) dollars with interest from April 2, 1878. This proceeding is to reverse that judgment.

II.

ARGUMENT.

The petition in this cause, after setting out the entry of the decree in Iowa, avers that the court which rendered the same, was, at the institution of said suit and final submission of the same, a court of general jurisdiction both in law and equity, and had jurisdiction to hear and determine said cause, as respects both the subject matter and parties. A copy of the decree was attached thereto, and is found at pages two, three, and four, of the printed record.

The answer avers want of jurisdiction to enter the decree and fraud in obtaining it.

To this a replication was filed, found at pages eight, nine and ten of the record.

The finding of facts is at pages ten and eleven of the printed record. This finding negatives the idea of fraud.

The assigment of error is that the decree rendered by the District Court of Iowa, was void for want of jurisdiction, because Stutzman was dead when it was entered.

The constitution provides that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

Section 905, of the Revised Statutes of the United States provides, that "the records and judicial proceedings * *, shall

have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from which they are taken."

A judgment of a court in Iowa, acting within its jurisdiction, is conclusive between the parties.

Hunger & Hallord, 39 Iowa, 539.

An inspection of the decree shows that it was the intention of the parties, including Mitchell, at the time the suit was finally submitted in the District Court of Webster County, Iowa, that the decree, when rendered, should be entered as of the term of submission, to-wit the October Term, 1868. It reads as follows: "This cause came on for final hearing on the 16th day of October, 1868, it being a day of the October Term of this Court, A. D. 1868, and S. Sibley and George W. Bassett appeared for plaintiff, and J. E. Jewett appeared *pro se*, and Duncomb & Beecher, and H. C. Henderson appeared for all the other defendants except Jean Baptiste Causa, and said Causa made no appearance; and as to said other parties, plaintiff and defendants, the cause was submitted upon the pleadings and proofs on file; and after argument of counsel the cause was finally submitted and taken under advisement by the court, *the decree herein to be rendered as of the said term of said trial and submission.* This last clause is meaningless unless it is intended to recite the fact, that the parties being there present, by their counsel consented that the decree should be entered as of the trial term. If, therefore, solemn consent can make this decree binding, it is not null, but binding. If the decree is utterly void it may be that the recitals go with it. In that case the recital as to the amendment of Mitchell after submission, goes with the rest. If it is not void, but voidable, the method of avoiding was by appeal or error proceedings. The amendment offered by Mitchell was allowed upon certain terms, which were never complied with. His amendment was accordingly stricken from the files, on account of his non-compliance. The amendment, so-called, was simply a paper put among the files by Mitchell, and had no connection with the case.

Jurisdiction, as applied to courts, means the power to hear and determine causes. The want of it may arise from two sources, viz: want of power over the subject matter, or want of power over the parties. The District Court of Iowa, at the time of the submission of the suit there, had jurisdiction in both respects. When jurisdiction is once acquired, it can only be lost by legislative deprivation.

When a judgment is said to be void for want of jurisdiction, it is because the court had not jurisdiction over the person *against* whom the judgment is rendered.

At Sec. 588 of Freeman on judgments, (2d Ed.) it is said: "The question which first suggests itself in regard to foreign judgments, is one which we have had occasion to investigate in reference to every other question of judgment, viz: Is the jurisdiction of the court an open question? and if so, were the subject matter of the controversy and the party *against* whom the judgment has been pronounced, within the jurisdiction of the court?"

The death of the plaintiff, instead of depriving the court of jurisdiction, simply caused a defect of parties.

A judgment for or against a dead person, where no suggestion of death is made, is not void, but voidable only.

Swasey & Co. vs. *Antram & Co.*, 24 Ohio State, 87; Freeman on Judgments (2d Ed.), Sec. 140, where it is said: "If jurisdiction be obtained over the defendant, in his lifetime, a judgment rendered against him, subsequently to his death, is not void." It makes no difference whether he be sole defendant or one of many. In the first instance if there be no cause after his death, in the latter there is equally no cause *as to him* in the same event. If, in the one, a judgment would be void, it should also in the other. The same reasons apply in both cases. Freeman cites the following cases to the above proposition:

Collins v. *Mitchell*, 5 Flor. 364.
Lornig v. *Folger*, 7 Gray, 505.
Coleman v. *McAnulty*, 16 Mo. 173.

Yaple v. *Titus*, 41 Pa. St. 203.
Day v. *Hamburg*, 1 Browne, 75.
Gregory v. *Haynes*, 21 Cal. 443.

And two cases contra.

Again, Sec. 153, Freeman: "Judgments for or against deceased persons are not generally regarded as void on that account." Citing:

Spalding v. *Wathen*, 7 Bush, 659.
Camden v. *Robertson*, 2 Scam., 508.
Sloetzell v. *Fullerton*, 44 Ills., 108.
Case v. *Ribelin*, 1 J. J. Mar. 30.

Even where the death of a party appears upon the record the judgment is simply erroneous, and not void.—Freeman, Sec. 153.

And again, in the same section he says: "This is because the court, having obtained jurisdiction over the party in his lifetime, is thereby empowered to proceed with the action to final judgment, and, while the court ought to cease to exercise its jurisdiction over a party when he dies, its failure to do so is an error to be corrected on appeal if the fact of the death appears upon the record, or by writ of error *coram nobis*, if the fact must be shown *aliunde*.

Apart from this the power of Courts of law and equity to enter judgments and decrees *nunc pro tunc*, and the circumstances under which such entries will be made, seem too well settled to admit of controversy. That it makes no difference whether the decedent be a sole party, plaintiff, or defendant, or one of many, seems equally clear. That the death of sole plaintiff or defendant, after submission of a cause, does not deprive the court of jurisdiction, is involved in the two first propositions.

If the effect of the death of the plaintiff be, as is claimed by the plaintiff herein, to deprive the court of jurisdiction, the want of jurisdiction commenced at the instant of his death; no matter whether it be suggested of record or not, and any entry in the case of whatever kind or nature, except to dismiss it, or to revive it where there is a statutory authority so to do, would be

null and void, whenever made; but that such is not the case, is abundantly shown by authorities in England and in this country.

In Chapter III., Sec. 56, of "Freeman on Judgments," (2d Ed.) the subject of *nunc pro tunc* orders is discussed at some length. He says: "the policy of entering judgments and decrees *nunc pro tunc* is agreeable to the maxim *actus curiæ neminem gravabit.*" "This maxim," says Mr. Broom, "is founded justice and good sense, and affords a safe and certain guide to the administration of the law. As an expression of the principle upon which judgments are given effect, as of some time prior to their actual entry, the maxim, in the interests of accuracy, requires to be changed to 'a delay of the court shall prejudice no one,' and to be limited in its application so as to affect none but the parties litigant. The power of making an entry *nunc pro tunc*, seems to have been possessed and exercised by courts of law and equity from the earliest times." Citing, *Mayor of Norwick* vs. *Berry*, 4 Burr, 2,277; *Hodges* vs. *Templer*, 6 Mod. 191; *Evans* vs. *Rees*, 12 Ad. & E. 167, and others.

"The period in which this power could be sucessfully invoked was never limited, a decree in one instance being entered after a lapse of twenty-three years."

At Sec. 57, he says: "the causes naturally resolve themselves into two classes. The first comprised a large number of actions in which no judgments had ever been rendered; but which were, so far as the suitors could make them, in condition for the rendition of final judgments. The second was composed of cases comparatively few in number, in which judgments, though formally pronounced, had from accident or from negligence of the clerks, never been put upon the records. . . . The necessity for entering judgments as of some day prior to this rendition, arose chiefly, if not exclusively, in those cases where, after the trial and submission of a cause, one of the parties died, as no judgment could be properly entered bearing date subsequent to his death. As the suitor

who brought his action on to trial and caused it to be tried and submitted, had manifestly been guilty of no *laches*, the court protected him from any prejudice that he might suffer by the death of his adversary after such submission, and instead of permitting the action to abate, directed the judgment to be given effect, if necessary, as far back as the day of submission, Thus the time taken by the court for deliberation, was, as far as possible, prevented from working injustice to the party who should, in the end, prevail in his suit."

At Sec. 59, he says: "But in every case to entitle the applicant to have his judgment entered *nunc pro tunc*, on account of the death of one of the parties, the action must at the time of such death have been ready for the rendition of the final judgment."

This principle is applicable as well to suits in equity as actions at law. See *Mayor of Norwich* vs. *Berry*, 4 Burr. 2,277. *Hodges* vs. *Templer*, 6 Mod. 191.

In the case of *Blaisdell* vs. *Harris*, 52 N. Hamp. 191, the subject is very elaborately discussed. Foster J. says: "At the common law the death of the plaintiff, or defendant, before, final judgment would have abated the suit; but as the rule was rigorous, and was found often to work injustice, it became modified in practice, subject to several exceptions and limitations, and it is now well established at common law, and independent of the special authority conferred by statute, by the general rules of the English courts, where it had its birth, that it shall be competent for the court, or the judge to order a judgment to be entered *nunc pro tunc;* that if either party die after a special verdict, or special case, and pending the time taken for argument, or advice thereon, or on motion in arrest of judgment, or for new trial, judgment may be entered after his death, as of the term in which the *postea* was returnable, or judgment would otherwise have been given *nunc pro tunc* . . . . that a delay arising from the act of the court may not turn to the prejudice of the party. The granting of leave so to enter up judgment, is in all cases discretionary

in the courts, and being a matter of indulgence, they have sometimes refused to allow it after a considerable lapse of time, where the delay has been owing to the plaintiff or his attorney." Citing, to Tidd's Pract. 932,933, and notes to the 3rd Amr. Ed.; 3d Chitty's Gen. Pract. 101. "Tidd speaks of special verdict, or special case, using those terms doubtless in a technical sense, as applicable to a verdict or case by which the facts are put on the record, and the law submitted to the judges; but the authority to the court to order a judgment *nunc pro tunc*, is not thus limited as will be seen by reference to numerous cases, but applies to any case where the operation and effect of a general verdict are suspended by the transfer of the case upon questions of law. It need hardly be remarked, that the rules in practice are not limited to the cases of judgments upon verdict, but to judgments rendered upon the pleadings upon non-suit, default, or any other stage of the case. Thus in a judgment for the plaintiff, when the defense demurred; it was alleged that since the time at which the court took to advise, the defendant in error had died, and therefore they prayed that they might enter a judgment *nunc pro tunc*, as was done in the case of *Boller* vs. *Delander*, Trin. 1, Geo. In. Br., which was ordered corrected. *Cumbler* vs. *Wane*, 1 Strange, 426: *Astley* vs. *Reynolds*, 2 Strange, 517: "In the latter the plaintiff had judgment, and the defendant dying pending the argument, judgment was ordered to be entered *nunc pro tunc*. The case of *Blewett* vs. *Tregonning*, 4 Adol. and E., 1,002; *Green* vs. *Cobden*, 4 Scott, 486. *Key* vs. *Goodwin*, 1 Man. and Scott, 620; *Copely* vs. *Day*, 4 Taunt. 702; *Fishmonger Co.* vs. *Robertson*, 3 M. G. & S., 970, as well as many others, fully attest the existence of this doctrine in England."

In the case of *Lawrence* vs. *Hodgson*, 1 Young & Jarvis, 372; Garrow B. says: "Where a case stands over for argument from term to term on account of the multiplicity of business in the court, or the judgment from the intricacy of the question a party ought not be prejudiced from that; but

ought to be allowed to enter up his judgment restropectively to meet the exigencies of the case.

In the case of *Bridges* vs. *Smythe*, 8 Bing. 29; a verdict had been obtained in the life time of Mrs. Bridges, and the amount of damages was referred to an arbitrator, who also made his award in her lifetime; but an application was made on her part to reduce the amount of damages, and the rule was pending during the time necessary for deciding other causes, which had priority; pending the rule Mrs. Bridges died, and it was entered in her *favor* after her death. See also, *Miles* vs. *Williams*, 9 Q. B. 47; *Treman* vs. *Tranah*, 12 C. B. 406. *Marg* vs. *Quinn*, 6 D. & E. 1. In *Berry* vs. *Wilson*, 7 Mass. 393, Parsons C. J. observes that where a case, was delayed for convenience of the court, they would always take care that no party suffer by such delay. *Patterson* vs. *Buckmeister*, 14 Mass. 144; *Currier* vs. *Lowell* 16 Pick. 170, in which case a verdict had been rendered in *favor* of the plaintiff against the City for injuries sustained to his personal property by reason of a defective highway. A motion was made by the defense for a new trial, and after the commencement of the ensuing term of the court, but before any hearing was had on the motion, plaintiff died. The court refused to dismiss the action, and upon overruling the motion for a new trial, ordered judgment to be entered up as of the preceding trial term. Express authority is given by the statute of 1842 in Massachusetts, and by the general statutes 115, section 4, to the courts, to enter any judgment as of a day of a former term, wherever justice requires it. But Metcalfe, J., says, in *Springfield* vs. *Wooster*, 2 Cush., 62: "we were all of opinion that the common law authorized us to enter judgment as of the term when the verdict was rendered. See also *Ryghtmyre* vs. *Durham*, 2 Wend., 245. In the case of *Goodard* vs. *Bolster*, 6 Greenleaf, 427, the plaintiff obtained a verdict in an action of trespass, *quare clausum fregit* and died before judgment, whereupon judgment was ordered as of the term when the verdict was returned.

In the case of *Hess* vs. *Cole*, 3 Zab., 116; there is a note to page 125 to this effect: This cause was argued at the January term last, the court taking time to advise until the present term, when the demurrer was sustained and judgment ordered for the plaintiffs. In the meantime, after the argument, and before the judgment was pronounced, the defendant, Cole, died; application was made to have the judgment entered as of the term when the argument was had, which was granted by the court. The court says: "When a delay has occurred by the action of the court, as in the present instance, as by taking time to advise, the Court will, in general, permit judgment to be entered *nunc pro tunc.*"

In the case of *Campbell* vs. *Mescir & Dunston*, 4 Johns. Ch., 333, one of the defendants died after argument and before decision, and the decree was ordered to be entered as of the term at which the case was heard. See also *Davis* vs. *Davis*, 9 Ves. 461; *Burnham* vs. *Dalling*, 16 N. J. Eq. 310.

It is useless to amplify authorities upon this point, for they are to be found not only in England but in every State in this country by simple reference to the digests. The doctrine seems to be as well established in Iowa where this judgment was rendered, as elsewhere. In the case of *Julian Gas-Light Co.* vs. *Hurley*, 11 Iowa, 520, a *nunc pro tunc* entry was made.

In the case of *Shepherd* vs. *Brenton*, 20 Iowa, 42: a verdict in the case was rendered at the April term, 1864, of the Boone District Court, but the clerk failed or neglected to enter any judgment thereon; though it does not appear that the defendant's motion in arrest and for new trial was overruled. The judgment was finally entered as of the term of the rendition of the verdict, and it was insisted that the court had no power to enter this judgment. But the court held that the case did not fall within the sections of the revised statutes which had been cited, and that the District Court had such power. In the case of *Rose et al* vs. *D. V. Railway Co.*, 47 Iowa, 420, the court made an entry *nunc prot unc*, correcting an execution, and it was

supported by the Supreme Court. In the case of *Fuller & Co.* vs. *Stebbins*, 49 Iowa, 376, the court says, at page 377: "Courts possess the inherent power to enter judgments *nunc pro tunc*, and time will not bar its exercise."

The law seems to be well settled and very clear and definite. The recognition of it in the courts of Iowa goes to its utmost extent. In the last case cited it is mentioned as being a power inherent in the court. What power is meant here? Manifestly, the power as it existed in law and equity, and as established by the authorities heretofore mentioned. That the present case is one coming within the established principles, we think is not open to doubt. The cause was ready for final submission, it was closed as to the testimony, submitted to the court, argued and taken under advisement, and thus comes within the exact words of the authorities.

The principle involved in this case is one simply of power. Did the court have power in any case to enter judgment *nunc pro tunc?* For no matter how erroneously the court may have exercised its power, or how much it might have abused its discretion, those matters can not be corrected in this proceeding. The court is bound to presume that the power was exercised rightly. In the case of *Irwin et al.* vs. *Hazelton*, 37 Penn. St., 467, the court, speaking of such an entry, says: "It was in substance the exercise of the ordinary and well recognized power of entering a judgment *nunc pro tunc;* and if they had the power, we must presume, in the absence of reasons to the contrary, that it was rightly exercised."

In the case of *Blaisdell* vs. *Harris*, 52 N. Hamp., 196, the court says: "Any delay which was occasioned by the transfer of the case for advisement after verdict upon trial proceedings, by a party who is not in fault, but is asking in a rightful manner, as the defendant in this case was, the full and ultimate consideration of this cause is deemed the act of the court, whether in fact the decisions of the questions transferred is retarded by the pressure of business, or only by the lapse of time between the trial and the law term."

It is claimed by the plaintiff in error, that the provisions of the law of Iowa, in relation to the revivor of actions impliedly prohibit the Courts from exercising the power of making a *nunc pro tunc* entry. We take it to be the law, that this court will take judicial notice of the laws of the several States.

Owings vs. *Hull*, 9 Pet., 607.
McNeil vs. *Holbrook*, 12 Pet., 84.
Gordon vs. *Hobart*, 2 Sumn., 401.
Woodworth vs. *Spafford*, 2 McLean, 168.
Jasper vs. *Porter*, 2 McLean, 579.
Jones vs. *Hays*, 4 McLean, 521.
Mewster vs. *Spalding*, 6 McLean, 24.
Merrill vs. *Dawson*, Hempst, 563.
Pennington vs. *Gibson*, 16 Howard, 65.
Cheever vs. *Wilson*, 9 Wall, 108.
Hinde vs. *Valtier*, 5 Pet., 398.
Pease vs. *Peck*, 18 Howard, 595.
Wharton on Evidences, §§ 287 and 289.

The sections of the code of Iowa, embodied in the finding in this case, are contained in the revision of the laws of Iowa, in 1860. The counsel for the plaintiff in error presented them at the trial below, and upon his assertion, and the understanding that he had made search, they were admitted without controversy, as the law of Iowa prevailing at the time of the entry of the decree, which we are now seeking to collect. Upon investigation, however, it now appears that these sections were repealed on the 18th of April, 1862. See Chap. 174, of the laws of the 9th General Assembly, of Iowa; and supplied by a general provision as follows: "Actions either *ex contractu*, or *ex delicto*, do not abate by the death, marriage or other disability of either party; nor by the transfer of any interest therein, if from the legal nature of the case the cause or causes of action can survive or continue; in such a case the court may on motion allow the cause to be continued by or against his legal representative, or successor in interest; but

in case of the death of a defendant, the notice shall be served upon his representative under the direction of the court."

This last was in force in 1868.

If the court takes judicial notice of the laws of the several States, the finding of the court below upon this point was immaterial and superfluous, and the finding of a matter of law. Therefore, this court will itself look at the law which was actually in existence at the date referred to. Outside of this, while we do not find any authorities on the clauses mentioned, the reasoning upon them, in this connection, would be obvious enough, upon the assumption that they were in existence at the date specified, to-wit, 1868. We claim that the authority in the 49th Iowa, 376, is very strongly in our favor. Because, upon the theory of the plaintiff in error, it would have been incorrect to speak of the courts possessing the inherent authority to enter judgments *nunc pro tunc* at the December Term, 1878, without qualifications, when the power was taken away by the statutes, in almost the only case where it ever became necessary to exercise it. Further, no case for revivor ever existed, for the reason that in the eye of the law, the judgment was actually rendered within the lifetime of the plaintiff. It is a case which was not only submitted, argued, held under advisement and decided, but the judgment itself was actually entered while the plaintiff was in life, for this is the effect of the *nunc pro tunc* entry.

In the case of *Blaisdell* vs. *Harris*, already twice cited, the court says, at page 197: "The plaintiff, by the order for judgment *nunc pro tunc*, stands in the position of a party having obtained judgment before the decease of the defendant. Therefore, we come after all back to the very same question with which we started; for if that be the effect of the judgment, the question simply remains whether the court had the power to make such an order."

The case cited by council for plaintiff in error from 62 Maine, 486, was a judgment entered at the April Term, 1872, as of that term when the action was tried and verdict ren-

dered at the April Term, 1871, and the death occurred in November, 1871. This is not an authority against the power to enter a judgment *nunc pro tunc*. Because the judgment in that case was not entered *nunc pro tunc*, it was irregular and erroneous. At page 487, the court cites the case of *Stickney* vs. *Davis*, 17 Pick., 169, and the remarks of Shaw, C. J., with approbation, viz: "Where a cause, after argument, is held under advisement, the court will order a judgment to be entered *nunc pro tunc*, TO AVOID ENTERING AN ERRONEOUS JUDGMENT, when a party has died in the meantime.

In *Goddard* v. *Bolster, et al.*, 6 Me., 427, the sole plaintiff obtained a verdict and died. The judgment was afterwards entered, *nunc pro tunc*, in favor of a sole dead plaintiff.

The case of *The State* vs. *Waldo Bank*, 20 Me., 478, desides the same proposition, where the defendant was a corporation which had become defunct.

In *Lewis* vs. *Soper*, 44 Me., 72, the court, at page 76, say: "The death of the defendant (a sole defendant) has been suggested during the present law term; it seems well settled that in such a case judgment may be entered up as of a preceding term," citing and quoting from *Currier* vs. *Lowell*, 16 Pick., 170, that such a judgment would be good at common law.

The cases from Tennessee were cases where the judgments were entered as of a time subsequent to the death of the party, and therefore are not germane to this controversy.

So are the following:

McCullough vs. *Norwood*, 58 N. Y. 562.
Tarleton vs. *Cox*, 45 Miss. 430.
Young vs. *Pickens*, 45 Miss. 553.
Parker, Admr. vs. *Horne*, 38 Miss. 215.
Finney vs. *Ferguson*, 3 W. & S. 413.
N. O. & C. R. R. Co. vs. *Bosworth*, 8 La. Ann. 80.
Norton vs. *Jamison*, 23 La. Ann. 102.
McCreery vs. *Everding*, 44 Cal. 284.
Ewald vs. *Corbett*, 32 Cal. 493.
Judson vs. *Love*, 25 Cal. 463.

Griswold vs. *Stewart*, 4 Cowen, 457.
Haydock vs. *Cobb*, 5 Day Conn. 527.
Gerry vs. *Post*, 13 How Pr. 48.
Morse vs. *Tappan*, 3 Gray, 411.
Loring, Admr. vs. *Folger*, 7 Gray, 505.
Randall's Case, 2 Mod. 308.
Warter vs. *Perry & Spring*, 3 Cro. Eliz, 199.
Dial vs. *Holter*, 6 O. S. 228.
M. Fitzgerald vs. *Stewart*, 53 Pa. St. 343.
Griffith vs. *Ogle*, 1 Binn. 172.
Murray vs. *Cooper*, 6 S. & R. 126.

In the latter case judgment was entered *nunc pro tunc*, as of a date eight years prior to its entry. The court says, after referring to the statute of Charles 2: "In such a case the plaintiff is entitled to his judgment by virtue of the statute, without calling upon the court to exercise any extraordinary power. But independently of the statute the court has power, in order to do justice, to enter judgment at their discretion, as of a time when it ought to be rendered."

In *Fitzgerald* vs. *Stewart*, this language is quoted with approval and the court say: "Nor is this power of the court limited at all by the nature of the action pending."

The case of *Brown* vs. *Wheeler*, 18 Conn., 208, states the same doctrine.

Also *Currier* vs. *Lowell*, 16 Pick., 170.

In *Toumy* vs. *Dunn*, 77 N. Y., 517. The court says: "A judgment was sometimes entered as of a time before the defendant's death. But that was to make the judgment good and not voidable for error, as it otherwise would have been, if entered up after death of the party," though it was held in the case that the delay was owing to the *laches* of the plaintiff, and the order was reversed.

In the case of *Ryghtmyre* vs. *Durham*, 12 Wend., 245, and in *Crawford* vs. *Wilson*, 4 Barb., 504, the power of entering *nunc pro tunc* was exercised. In the latter case, at page 524, the court say, "the entry of judgment in this case was delayed

by the bill of exceptions of the defendant, and in every such case, the statute has no application whenever a party is delayed by the act of the court, the court upon common law principles, without regard to the lapse of time, allow the judgment to be entered up, as of a term when the party was alive. A delay arising from the act of the court is never allowed to prejudice the party. Judgment was accordingly entered *nunc pro tunc*. In the case of *Dial* vs. *Holter*, 6 Ohio State, 245, Bowen J. says, "the power of courts to enter *nunc pro tunc* order and judgments is discretionary. It may be exercised in a proper case to prevent injustice, whenever there is a foundation presented by the facts of the case, for the exercise of such power, there should be no hesitation in making the entry. It has been frequently done in this State, and is a practice well known and often followed in the common law courts of England and of this country." In this case the *sole* defendant had died and three years afterward the judgment was entered as of the trial term.

Bowen J. further says, "personal actions by the common law, as well as by the statute, abate by the death of the party. If before verdict such an event happens to one of the suitors, the cause is brought to an end, but if after verdict and before judgment he dies, the rule is different." And after citing various cases: "these and other cases to the same point, proceed upon the supposition that judgment might and undoubtedly would have been entered for the plaintiff in time, had it not been for the delay occassioned by the defendant in filing his motion for new trial, and that when the motion does not prevail, it ought not to work any prejudice to the rights of the plaintiff."

It appears from the case of *Judson* vs. *Love*, 35 Cal. 463, cited at page 14, of plaintiff's brief, that in that State such a judgment would be valid. This language is in the opinion as quoted: "It is clear that all these proceedings, *except the entry of judgment on the verdict before rendered*, had since the death of defendant, Harlow S. Love, on the 5th day of March, 1866, are irregular and void," etc.

We have followed the decisions cited against the decree for the purpose of showing that in the very courts in which the decisions were pronounced, the doctrine, for support of which we have cited so many authorities, is recognized to its fullest extent. The decisions are not irreconcilable. Some cases hold that a judgment for or against a dead man is void. A greater number hold that it only is erroneous. But in no case, so far as our research has extended, has a *nunc pro tunc* entry of judgment been held void when made on account of the death of one of its parties after verdict in an action at law, or after final trial and submission in a suit in equity. The principle which supports the Iowa decree, might be called a well settled exception to the rule laid down by the authorities cited by plaintiff in error, if its *nunc pro tunc* feature did not take it entirely out of the rule.

It makes no difference whether or not the party for or against whom the judgment is rendered be a sole plaintiff or defendant, as many of the cases cited by us are just such cases. The case of *Dial* vs. *Holter*, *supra*, was for damages for libel and slander, and as the court remarks, it was a kind of action that abated by the death of one of the parties, both by force of the common law and the statute, and abated beyond revival, and yet the entry was made *nunc pro tunc*. In many similar cases which abate totally by the death of one party, as well as in cases where the cause of action has been taken away by statute, the principle has been applied.

These principles have been recognized in *Pres't., etc., of N. S. Bank* vs. *Weisiger*, 2 Peters, 481.

In *Gray* vs. *Brignardello*, 1 Wall., 636, Davis J. says: "A *nunc pro tunc* order is always admissible, when the delay has arisen from the act of the court."

Also in *Griswold* vs. *Hill*, 1 Paine C. Ct. R., 484, where the general doctrine is recognized, though a distinction is taken between the Federal courts, which are open during term only, and other courts which are always open, "and may, and frequently do make the judgment or decree relate back to a distant day."

Also in *Davies* vs. *Davies*, 9 Ves., 461, the report of which is very short, but very pithy.

And in *Daniels Chancery Pr.*, 1,028.

The existence of statutes allowing *nunc pro tunc* entries within a certain limited period, argues not the strictness but the laxity of the common law in that regard regarding the fact that the period within which such order might be made should be restrained.

We do not dispute the doctrine of abatement, but where a cause has not been tried, the attempt to apply the maxim *Actus curiæ neminem gravabit*, shows the utter fallacy of the argument for plaintiff in error, and its application to this case. For there is nothing for that maxim to operate upon until the cause gets into the hands of the court, and it is therefore only then that the principle comes into play, at that stage. It is just that the death of a party should not have the effect of compelling a retrial. None of the plaintiff's cases hit the question; they are generally cases of abatement by the death of a party before submission or verdict. Different principles apply to our case, arising out of the fact that the death happens at that point in the progress of the litigation, when it becomes lawful for the court to enter judgment *nunc pro tunc*. Up to that the plaintiff's law is good, but it falls short of the mark.

Our point is that while before verdict, in an action at law, or final submission of a suit in equity, death will abate the action, yet a judgment in such action without revival is not void, and if such death, even of a sole plaintiff, occur after that period, the judgment may, with perfect propriety, be entered *nunc pro tunc*, to avoid the effect of such death, as in this case.

We call the attention of the court to the fact that no assignment of errors was annexed to the citation herein, as is required by Sec. 997, of the Revised Statutes. The court will not, therefore, consider the assignment in the brief.

Respectfully submitted,

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